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Whitman's Opportunity

Lewis Op-Ed in Tech Central Station

Op-Eds & Articles

by Marlo Lewis, Jr. </dyn/view\_expert.cfm?expert=10>

March 12, 2003

Does the Clean Air Act impose a "mandatory duty" on the Environmental Protection

Agency (EPA) to regulate carbon dioxide (CO2), the principal greenhouse gas targeted by the Kyoto Protocol?

That's what the Attorneys General (AGs) of Connecticut, Massachusetts, Maine, New York, New Jersey, Rhode Island, and Washington assert in two recent notices of intent to sue EPA Administrator Christine Todd Whitman. In effect, the

AGs

claim the Clean Air Act compels Whitman to implement the Kyoto Protocol-a non-ratified treaty.

Far from it being EPA's duty to regulate CO2, EPA has no authority to do so. The

plain language, structure, and legislative history of the Clean Air Act demonstrate that Congress never delegated such power to EPA.

The AGs somehow miss the obvious. The Clean Air Act (CAA) provides distinct grants of authority to administer specific programs for specific purposes.

It

authorizes EPA to administer a national ambient air quality standards program, a

hazardous air pollutant program, a stratospheric ozone protection program, and

so on. Nowhere does it even hint at establishing a climate protection program.

There is no subchapter, section, or even subsection on global climate change.

The terms "greenhouse gas" and "greenhouse effect" do not occur anywhere in the

Act.

#### Definitional Possibilities Don't Cut It

Lacking even vague statutory language to point to, the AGs build their case on

"definitional possibilities" of words taken out of context-a notoriously poor

guide to congressional intent [FDA v. Brown & Williamson, 120 U.S. 133 (2000)].

The AGs argue as follows:

CAA Section 302(g) defines "air pollutant" as "any ... substance or matter which is emitted into or otherwise enters the ambient air." CO2 fits that definition, and is, moreover, identified as an "air pollutant" in Section 103(g).

Sections 108 and 111 require EPA to "list" an air pollutant for regulatory action if the Administrator determines that it "may reasonably be anticipated to

endanger public health and welfare."

The Bush Administration's Climate Action Report 2002 projects adverse health and welfare impacts from CO2-induced global warming, and EPA contributed

to that report.

Hence, Administrator Whitman must initiate a rulemaking for CO2.

The AGs' argument may seem like a tight chain of reasoning. In reality, it is

mere wordplay, a sophomoric attempt to turn statutory construction into a game

of "gotcha." No regulatory authority can be inferred from the fact that CO2 meets an abstract definition of "air pollutant" that applies equally well to

oxygen and water vapor. Indeed, the very text cited by the AGs-Section 103(g)-admonishes EPA not to infer such authority. 103(g) concludes:

"Nothing in

this subsection shall be construed to authorize the imposition on any person of

air pollution control requirements." If nothing in 103(g) can authorize the imposition of control requirements, then the passing reference therein to

CO2 as  
an "air pollutant" cannot do so.

As to the phrase "endanger public health and welfare," it proves too much. It applies equally well to many substances that EPA does not-and may not-regulate under Sections 108 and 111. For example, chlorofluorocarbons (CFCs) are emitted into the ambient air, and are believed to endanger public health and welfare by thinning stratospheric ozone. EPA regulates 53 ozone-depleting substances under Sections 601-618. Congress added those provisions in the 1990 CAA Amendments precisely because existing authorities-including Sections 108 and 111-were unsuited to address the issue of ozone depletion.

Section 108 provides authority for EPA to set national ambient air quality standards (NAAQS), which determine allowable emission concentrations for certain pollutants. Section 111 provides authority for EPA to set new source performance standards (NSPS), which determine allowable emission rates for certain pollutants from new stationary sources. Attempting to protect stratospheric ozone by establishing allowable ambient levels or allowable new source emission rates for CFCs would be a fool's errand. Congress had to amend the CAA and add Title VI before EPA could lawfully implement a stratospheric ozone protection program. Similarly, Congress would have to amend the Act again before EPA could implement a regulatory climate protection program.

#### Words Out of Context

To interpret a statute, one must read the words not "in isolation" but in their "statutory context" [FDA v. Brown & Williamson, at 133]. The AGs cite Section 103(g)'s reference to CO2 as an "air pollutant," but do not mention that 103(g) is a non-regulatory provision (it directs the Administrator to develop "non-regulatory strategies and technologies" for controlling air emissions). Nor do they point out that 103(g) is the sole CAA provision to mention "carbon dioxide." And, as we have seen, they fail to note 103(g)'s caveat against inferring pollution control "requirements."

Worse, the AGs say nothing at all about Section 602(e), which contains the CAA's sole reference to "global warming." 602(e) is also a non-regulatory provision (it directs the Administrator to "publish"-i.e., research-the "global warming potential" of ozone-depleting substances). It, too, concludes with a caveat: "The preceding sentence [concerning global warming potential] shall not be construed to be the basis of any additional regulation under [the CAA]."

So there you have it. When the CAA mentions "carbon dioxide" and "global warming," it does so only in the context of non-regulatory provisions, and each time warns EPA not to infer authority for additional (unspecified) regulation.

#### Absurd Exercise in Futility

The AGs of Connecticut, Massachusetts, and Maine contend that EPA must begin the process of setting national ambient air quality standards for CO2. However, the NAAQS program, with its state-by-state implementation plans, and county-by-county attainment and non-attainment designations, targets pollutants that vary regionally and even locally in their ambient concentrations. Thus, as attorney Peter Glaser explains, the NAAQS program has no rational application to a global atmospheric phenomenon like the greenhouse effect.

Although CO2 concentrations vary slightly from place to place due to different sources and sinks, CO2 is well mixed throughout the global atmosphere, and it is global concentrations that supposedly influence climate change. Consequently, it is not even possible to imagine how EPA, after setting a NAAQS for CO2, could assign attainment or non-attainment status to any state or county without simultaneously assigning the same status to all other states or counties. When has EPA ever published a NAAQS that effectively-and instantly-turned the entire country into a gigantic attainment or non-attainment area?

It gets even sillier. Since a multilateral regime like Kyoto would barely slow the projected increase in CO2 concentrations, it is incomprehensible how any state implementation plan could "specify the manner in which primary [health] and secondary [welfare] ambient air quality standards will be achieved and maintained within each air quality region of such State," as required by CAA Section 107(a).

Any attempt to apply Section 108 to CO2 must founder on such imponderables. Consider the possibilities. If EPA set a NAAQS for CO2 above current atmospheric levels, then the entire country would be in attainment, even if U.S. hydrocarbon fuel consumption suddenly doubled. Conversely, if EPA set a NAAQS for CO2 below current levels, the entire country would be out of attainment, even if all power plants, factories, and cars shut down. If EPA set a NAAQS for CO2 at current levels, the entire country would be in attainment-but only temporarily. As

soon

as global concentrations increased, the whole country would be out of attainment, regardless of whether U.S. emissions were going up or going down.

When certain words in a statute lead to results that are "absurd or futile," or "plainly at variance with the policy of the legislation as a whole," the Supreme Court follows the Act's "policy" rather than the "literal words" [United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1939)]. Attempting to fit CO2 into the NAAQS regulatory structure would be an absurd exercise in futility, and plainly at variance with the Act's policy-powerful evidence that when Congress enacted Section 108, it did not intend for EPA to regulate CO2.

#### Flunking Legislative History

Legislative history also compels the conclusion that EPA may not regulate CO2.

When the Senate passed its version of the 1990 CAA Amendments (S. 1630), it declined to adopt a provision that would have established CO2 emission-rate standards for automobiles. House and Senate conferees subsequently deleted provisions that would have made "global warming potential" a basis for regulating ozone-depleting substances. In short, when Congress last amended the

CAA, it considered and rejected regulatory climate protection strategies. The

AGs do not have a leg to stand upon. As the Supreme Court has stated: "Few principles of statutory construction are more compelling than the proposition

that Congress does not intend sub silentio to enact statutory language that it

has earlier discarded in favor of other language" [INS v. Cardozo-Fonseca, 480

U.S. 421, 442-43 (1983)].

What about Section 111-does Whitman have a duty to establish performance standards for CO2 emissions from power plants? Not a chance. Congress enacted

Section 111 in 1970-before global warming was even a gleam in Al Gore's eye. At

no point in the deliberations on the 1990 CAA Amendments did Congress even consider proposals to apply the NSPS program to global warming. In the 105th,

106th, and 107th Congresses, Sen. Patrick Leahy introduced legislation to amend

Section 111 and set performance standards for CO2 emissions from power plants.

Each time the bill failed to attract even one co-sponsor. The AGs would have us

believe Congress implicitly enacted the substance of Leahy's three-time loser

back in 1970. The phrase "laughed out of court" was invented for just such inanities.

Junk Science Doesn't Cut It, Either

Has Whitman "determined" that CO2 emissions endanger public health and welfare, as the AGs claim? The Bush Administration's Climate Action Report 2002 (CAR) is an alarmist document, and EPA contributed to it. However, the CAR's scary climate scenarios are a rehash of the Clinton-Gore Administration's report, Climate Change Impacts on the United States (CCIOUS), and the Bush Administration, in response to litigation by the Competitive Enterprise Institute, Sen. James Inhofe (R-OK), and others, agreed that the CCIOU climate scenarios are "not policy positions or statements of the U.S. Government."

Both the CAR and the CCIOUS rely on two non-representative climate models-the "hottest" and "wettest" out of some 26 available to Clinton-Gore officials. In addition, as Virginia State Climatologist Patrick Michaels discovered, and NOAA scientist Thomas Karl confirmed, the two underlying models (U.K. and Canadian) could not reproduce past U.S. temperatures better than could a table of random numbers. The CAR thus flunks Federal Data Quality Act standards for utility and objectivity of information. Any rulemaking based upon it would be challengeable as arbitrary and capricious.

In any event, because the CAA provides no authority for regulatory climate strategies, EPA could not regulate CO2 even if the CAR scenarios were based on credible science and did reflect U.S. Government policy.

#### Transparent Power Grab

It is not difficult to see what the AGs stand to gain if EPA classifies CO2 as a regulated pollutant. Instantly, tens of thousands of hitherto law-abiding and environmentally responsible businesses (indeed, all fossil fuel users) would become "polluters." The number of firms potentially in violation of the CAA would vastly increase. Since states have primary responsibility for enforcing the CAA, the AGs' prosecutorial domain would grow by orders of magnitude.

The AGs' notices of intent to sue create a test of leadership for Whitman. They put her in a cross fire between President Bush, who opposes Kyoto, and the EPA career bureaucracy, which has long sought the power to regulate CO2, and which, during the Clinton-Gore Administration, asserted the same bogus legal opinions the AGs now espouse. Whitman should relish this challenge. The AGs have unwittingly handed Whitman an opportunity to refute their arguments and, by so doing, avert an era of anti-energy litigation.

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